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HAND DELIVER

William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

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ATTN: The Honorable John M. Frysiak

RE: Family Broadcasting, Inc., MM Docket No. 94-20, Hague,  
New York (BPH-910924MB)


Dear Mr. Caton:

Transmitted herewith on behalf of Family Broadcasting, Inc. is an original and five copies of it "Reply Findings of Fact and Conclusions of Law" submitted in connection with the above-referenced pending docketed proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

**FAMILY BROADCASTING, INC.**

By:   
Joseph E. Dunne III  
Its Attorney

JED:B91

xc: All Per Attached Certificate of Service  
Alex D. McEwing

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BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re Application of ) MM Docket No. 94-20  
FAMILY BROADCASTING, INC. ) File No. BPH-910924MB  
For Construction Permit )  
for a New FM Station on Channel )  
229A, Hague, New York )

To: The Honorable John M. Frysiak  
Administrative Law Judge

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Family Broadcasting, Inc. ("Family"), by its undersigned attorney and pursuant to Section 1.263 of the Commission's Rules and Regulations, 47 C.F.R. §1.263 (1994), hereby submits this reply to the "Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law" ("MMB Findings") in accordance with the Presiding Officer's Order, FCC 94M-612 (released November 9, 1994). In support of its Reply Findings, Family shows and states as follows.<sup>1</sup>

**I. Misrepresentation Issue**

1. At the outset, the MMB Findings on the misrepresentation issue accurately reflect the record and the law. The record fully supports a finding that, in all events, Family's representations to the Commission were, to its knowledge, accurate. Family clearly

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<sup>1</sup>. Family's "Proposed Findings of Fact and Conclusions of Law" will be cited as "Fdgs. ¶ \_\_\_\_." The "Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law" will be cited as "MMB Fdgs. ¶ \_\_\_\_."

made its representations with innocent intent, and never knowingly misrepresented facts to the Commission. Without an intent to deceive an applicant cannot be disqualified for misrepresentation. Fox Broadcasting, Inc., 93 F.C.C.2d 127, 53 Rad. Reg. 2d (P&F) 44 (1983).

#### **11. Site Availability Issue**

2. The Mass Media Findings conclude that Family did not have reasonable assurance because Mr. McEwing asked Mr. Westbrook if he had any objections to Family specifying the Mt. Defiance site and that Westbrook replied by requesting a "formal proposal" with "the rent Family would be willing to pay, the time frame involved, the amount of electricity that would be required and the amount of space in the transmitter room that Family would need." MMB Fdgs. ¶ 7. Since it could be argued that permission was expressly made contingent on the submission of a "formal proposal," which Family undeniably never submitted, it could be argued that Family never had permission to use the site. While the Mass Media Bureau's findings are plausible, they significantly alter the chronology of the conversation between Mr. McEwing and Mr. Westbrook, inaccurately describe Mr. Westbrook's response to Mr. McEwing's question concerning whether Westbrook had any objections to Family specifying the site, and ignores other evidence which supports the conclusion that Family did, in fact, receive Mr. Westbrook's permission to specify the Mt. Defiance site during the McEwing-Westbrook telephone call.

3. At the outset it is important to note that the Mass Media

Bureau Findings adopt Mr. McEwing's version of the conversation between Mr. McEwing and Mr. Westbrook, and essentially do not question either the credibility or the veracity of Mr. McEwing. The Mass Media Bureau's conclusions in this regard are consistent with the record. Mr. McEwing's credibility is established by his demeanor, supported by contemporaneous consistent statements, and is attested to by three different witnesses who described his reputation in the community for truth and veracity. Fdgs. ¶ 28.

4. If McEwing's testimony is credited, as it clearly was by the Mass Media Bureau, the Mass Media Bureau's findings are inaccurate in at least one critical aspect. The Mass Media Bureau argues that McEwing did not receive reasonable assurance because when he asked Westbrook if he had any objections to Family specifying the site, and Westbrook asked for a "formal proposal," including information concerning "Family's tax status," etc. MMB ¶ 7. If this chronology were correct one could imply that Westbrook's permission was conditioned on receipt of the "formal proposal." McEwing's testimony concerning Westbrook's response is significantly different, however. McEwing testified that Westbrook's request for a "formal proposal" came at the beginning of the conversation when McEwing first asked about the Mt. Defiance site's availability. Fdgs. ¶ 7. It was at the end of the conversation, and after Mr. McEwing had both told Mr. Westbrook that he needed "reasonable assurance" and explained to him what "reasonable assurance" meant, that Mr. McEwing asked Westbrook if he had any objections to Family specifying the Mt. Defiance site.

Westbrook's response to Mr. McEwing's was not "no," nor even impliedly negative. It did not indicate or imply that Family needed to wait, which was significant in view of the fact that McEwing told Westbrook of his need to file an application quickly. Westbrook's response did not represent or imply that board approval was necessary, nor was it conditional. McEwing was simply told to "send a letter," a significantly less formal reaction than asking him to submit a "formal proposal." McEwing's testimony establishes that he interpreted Westbrook's response rationally--that he had Westbrook's permission to specify the site, at least pending receipt of the letter and negotiations concerning site rent and other issues.

5. The chronology of the conversation is important. While Westbrook asked for a "formal proposal" at the beginning of the conversation, at the end, after McEwing explained what "reasonable assurance" meant he said only--"send a letter." Fdgs. ¶ 9 Westbrook's response is almost the same as the station manager in National Innovative Programming Network, Inc. of the East Coast, 2 FCC Rcd 5641, 63 Rad. Reg. 2d (P&F) 1534 (1987) who was asked exactly the same question that was put to Mr. Westbrook, and, when the station manager didn't express any objections, the Commission held that the applicant had received "reasonable assurance" to specify the site.

6. The Mass Media Bureau's findings also overlook other record evidence which at least suggests that Family had received permission to specify the Mt. Defiance site. The first and most

important evidence is Mr. Savoie's testimony regarding his conversation with the WANC engineer concerning technical information the day after McEwing spoke to Westbrook. Fdgs. ¶ 12. During this conversation the engineer revealed not only that he was aware that McEwing had called just the day before, but that he "had been instructed to be as accommodating as possible." Fdgs. ¶ 13. Clearly an engineer at the site would not have been instructed "to be as accommodating as possible" to Family unless the owner of the site knew that Family was preparing an application specifying the site and the site owner had no objections. This inference is supported by Savoie's testimony that he had had many conversations with engineers and site owners over the years, and that following the conversation with the WANC engineer he had no doubt that Family had received permission to use the site. Fdgs. ¶ 13.

7. Another fact that the Mass Media Bureau's findings ignore is the fact that Westbrook not once, but twice, gave Peter Morton permission to do the same thing that Family sought--specify the Mt. Defiance site in a Hague application. Why would Mr. Westbrook respond differently to Mr. McEwing than he had twice before to Mr. Morton who posed exactly the same question. Westbrook not once but twice gave Morton permission to use the Mt. Defiance site in a Hague application. Moreover, Westbrook's grant of permission to use the site was neither conditional nor dependent upon approval from Mr. Westbrook's board. In his second conversation with Mr. Westbrook Morton was also asked to provide a letter for the board, but Westbrook never intimated that permission to specify the site

was dependent on board action or approval. Edgs. ¶ 24.

8. While the fact that Westbrook twice gave permission to Morton does not prove that he gave the same permission to Family, the fact that Morton was given permission in a conversation which sounded eerily like that Mr. Westbrook had with Mr. McEwing is powerful evidence that Mr. Westbrook did, in fact, give Family permission to specify the Mt. Defiance site during his conversation with Mr. McEwing.

### **III. Acceptance of Family's Amendment**

9. The Mass Media Bureau's Findings argue that Family's amendment cannot be accepted, regardless of its showing of "good cause," because it never had reasonable assurance of the availability of its antenna site. Family's conclusions are simply wrong. As argued above and at length in Family's Findings, Family did have "reasonable assurance" of its antenna site when it filed its application. In all events, therefore, Family's amendment, if it satisfies the other aspects of the traditional "good cause" showing, should be accepted.

10. Moreover, as argued in its Family's Findings, the Mass Media Bureau's bald citations to cases which hold that an applicant without reasonable assurance may not amend to a new site overlooks the equities of the case, visits a draconian punishment on an applicant the Mass Media Bureau concedes honestly believed it always had reasonable assurance to specify the site, and ignores Commission precedent which permits an applicant to amend to a new site when it specifies its first site through error or

inadvertence, such as an error in transmitter site coordinates.  
See Fdgs. ¶¶ 53-58.

11. As noted in paragraphs 53-55 of its Findings, Family did not discover a reported case in which an applicant which innocently but erroneously specified a site was not permitted to amend. In each of the cases in which the applicant's lack of initial reasonable assurance was held to preclude the applicant's later amendment to a new site, the applicant had never contacted the site owner for permission, or was guilty of misrepresentation, lack of candor, or some other fault in initially specifying the site. For example, the case cited by the Mass Media Bureau, Rem Malloy Broadcasting, 6 FCC Rcd 5843, 70 Rad. Reg. 2d (P&F) 9 (Rev. Bd. 1991), is illustrative. In Rem Malloy an applicant sought and received a site owner's permission to specify his 22 foot building as its site in its application, but concealed from the site owner the fact that the applicant proposed to build a 258 foot tower on top of the 22 foot building. When the site owner was finally acquainted with the applicant's proposal it immediately withdrew its permission to use the site, and the Commission held that because of the applicant's initial lack of candor the site owner had never given his "informed consent" to the applicant's proposal.

12. Family, on the other hand, committed no fault or concealed anything from either the site owner or the Commission. Family consulted with counsel concerning the meaning of "reasonable assurance," and told Mr. Westbrook that it needed "reasonable assurance" to specify the Mt. Defiance site. Mr. McEwing even



accurately defined "reasonable assurance" for Mr. Westbrook. At all times Family proceeded in the honest belief that it had received the site owner's permission to specify the Mt. Defiance site. Accordingly, regardless of whether Family actually received permission to use the site, specification of the site was the result of innocent error and distinguishes this case from those in which an applicant was not permitted to amend later where it lacked reasonable assurance when it specified its initial site. In its equities, this case more closely parallels cases like Harrison Broadcasting Co., 6 FCC Rcd 5819, 70 Rad. Reg. 2d (P&F) 40 (Rev. Bd. 1991), which, incidentally, was decided almost contemporaneously with Rem Malloy Broadcasting, supra, where the Commission permitted an applicant to amend its application when it twice mistakenly specified coordinates which located the site on property which it had no permission to use. Likewise, the Commission refused to use "the blunderbuss of disqualification" on applicants which represented that they had received reasonable assurance of site availability on land controlled by the Bureau of Land Management, which had a policy of refusing to give permission to use a site until the FCC had granted the application. While the representation that the applicants had obtained "reasonable assurance" was not strictly accurate, the Commission held that the applicants had acted in good faith and did not add a site availability issue. Arizona Number One Radio, Inc., 103 F.C.C.2d 550, 60 Rad. Reg.2d (P&F) 89, 93 (Rev. Bd. 1986). Using the "blunderbuss of disqualification" by dismissing Family's

application serves the public interest no more here than it did in Arizona Number One Radio, Inc., supra.

13. Finally, the Mass Media Bureau's findings make no reference to the equities in this case or to the public interest represented by Family's proposal to provide the first transmission service to Hague. This proceeding features a single applicant, guilty, even if one accepts the Mass Media Bureau findings and conclusions, of no more than an innocent mistake. Family has invested a great deal of resources to initiate the first ever transmission service to Hague, New York, and has a proven track record of putting stations on the air. The quick grant of Family's application serves need for initiating broadcast service in the public interest which, ultimately, must be the lodestar of the Commission's decision.

Respectfully Submitted,

**FAMILY BROADCASTING, INC.**

By: 

Joseph E. Dunne III  
Its Attorney

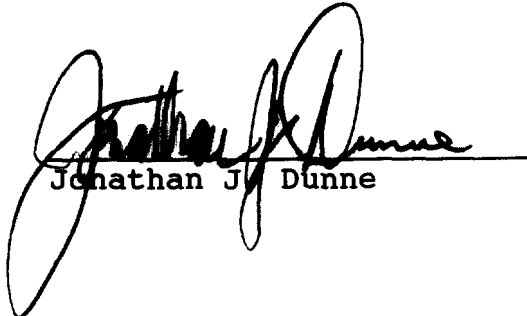
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**CERTIFICATE OF SERVICE**

I, Jonathan J. Dunne, a paralegal in the offices of Joseph E. Dunne III, Attorney At Law, hereby certify that on this 15th day of February, 1995 I caused a copy of the foregoing "REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW" to be sent by first class U.S. mail, postage prepaid, to the following.

The Honorable John M. Frysiak  
Administrative Law Judge  
Federal Communications Commission  
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Room 223  
Washington, D.C. 20554

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Hearing Division, Mass Media Bureau  
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Jonathan J. Dunne